Keng Kien Hock v Timbalan Menteri Keselamatan Dalam Negeri Malaysia and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J–01–90 OF 2006
MOHD GHAZALI, ZULKEFLI AND LOW HOP BING JJCA
19 JULY 2007

Administrative Law — Exercise of administrative powers — Detention — 24 day delay in issuance of order — Appellant unconvicted prisoners not detained or treated in a civil prison — Whether restrictive order null and void — Whether delay explained and found not to be unreasonable — Interpretation Acts 1948 and 1967 s 54(2) — Restricted Residence Act 1933 ss 2 & 3 — Prison Regualtions 2000 reg 165, Part 17

Preventive Detention — Detention order — Validity of — Restricted residence — Arrest and detention of person — Delay in making restriction order — Restriction order should be made with all convenient speed — Interpretation Acts 1948 and 1967 s 54(2) — Restricted Residence Act 1933 ss 2 & 3 — Prisons Regulations 2000 reg 2, Part 17 of the Schedule

In all these four appeal cases the four appellants appeaed against the decision of the learned judicial commissioner of the High Court at Johor Bahru in dismissing their respective application for a declaration that the restriction order issued against them by the Deputy Minister of Internal Security ('deputy minister') under s 2(2) of the Restricted Residence Act 1933 (Revised 1989) ('the Act') was null and void and of no effect. It was agreed that the court would hear argument and decide on the appeal by the appellant in Civil Appeal No J–01–90–06. Learned counsel for the other three appellants and the learned senior federal counsel for the respondents informed the court that they would be adopting the same submission as in Appeal Case No J-01-90-06 for all the three other appeal cases in J–01–91–06, J–01–101–06 and J–01–102–06.

The appellant, Keng Kien Hock was arrested on 6 December 2005 in Batu Pahat at about 1.30pm under a warrant of arrest and detention issued by the deputy minister under s 2(1) of the Act and brought to Batu Pahat District Police Headquarters. Thereafter on the same day at 6pm the appellant was taken to Kluang Prison, Johor and detained therein until 30 December 2005. On 30 December 2005 the deputy minister issued a restriction order under s 2(2) of the Act restricting the appellant in Mukim Kulim, Daerah Kulim, Kedah for three years commencing 30 December 2005 and placing the appellant under police supervision for the said period.

On the first issue which was whether the appellant's prolonged detention at the Kluang Prison before the issuance of the restriction order dated 30 December 2005 by the deputy minister was unlawful and null and void as the deputy minister took 24 days from the date of arrest to issue the restriction order under s 2(2) of the Act

it was the contention of the appellant that the learned judicial commissioner had erred in his finding that the delay was not unreasonable and in accepting the explanation of the deputy minister.

On the second issue that was whether the appellant's detention at Kluang Prison, Johor from 6 December 2005 to 30 December 2005 together with other prisoners therein amounted to a detention in Civil Prison, the crux of the appellant's contention was that he was never detained nor treated in 'Civil Prison' simply because there was no specific provision or rules or gazette notification on civil prison made under the Prisons Act 1995.

On the third issue which was whether the officer-in-charge of the Kluang Prison, Johor had complied with s 3(2) of the Act and in particular whether warrant of release as in Form D of the Schedule to the Act had been issued, the appellant contended that the respondents failed to prove that there had been a compliance with the requirement of s 3(2) of the Act.

Held, dismissing the appeal and accordingly dismissing the other three appeal cases with no order as to costs:

(1) Section 54(2) of the Interpretation Acts 1948 and 1967 provides that where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises. The term 'a convenient speed' is not defined by any statute. However, the definition and meaning of 'a convenient speed' in the context of the scope of s 2 of the Act can be found from the judicial pronouncement made in earlier decided cases (see para 6).

(2) The applicable approach to be adopted is firstly, the appropriate test is not on the delay in carrying out the legal obligation but rather on whether the legal obligation was carried out with all convenient speed under the circumstances of the case. In other words, it was whether the minister or deputy minister had acted reasonably. Secondly, the burden of establishing the performance of the legal obligation under such circumstances remained on the applicant, the restricted person and never shifted to the respondent, the minister (see paras 8–9); *Phua Hing Lai & Ors. v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors and other appeals* [1990] 1 MLJ 173 and *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia v Liau Nyun Fui & Ors* [1991] 1 MLJ 350 followed.

(3) The position referred to England should not be made applicable because the Prisons Act 1995 and Prisons Regulations 2000 contained adequate provisions and rules relating to the issue raised on 'civil prison'. The absence of clear provisions and rules governing the term 'civil prison' or absence of place of detention duly declared by the Minister as 'civil prison' does not necessarily imply that there is a lacuna in the legislation relating to prison or non existence of civil prison. Hence there was no obligation on the minister to declare any place of detention as 'civil prison' (see para 14).

(4) The appellant in the present case, being a person detained under s 2 of the Act can be treated as 'unconvicted prisoner' falling under the category of a person

confined under civil process. It is to be noted provisions relating to 'unconvicted prisoners' are contained in Part 17 of the Prisons Regulations 2000 which include amongst others a provision in reg 165 relating to separation of unconvicted prisoners from convicted persons. As long as the respondents had proved that the appellant was detained in accordance with Part 17 of the Prisons Regulations 2000, then the respondents must be treated to have discharged their legal obligation as prescribed under the warrant of arrest and detention as in Form A of the Schedule to the Act (see para 17).

(5) Mere averment without producing the relevant warrant of release was insufficient to discharge the burden on the part of the respondent to show compliance with s 3(2) of the Act. The court did not agree with the appellant's contention. In the present case the respondent through the relevant officers had made specific averments in their affidavits regarding the issuance of the warrant of release Form D by giving a detailed account of the process of release from the prison and the handing over of the appellant to the police. The court further found the appellant in fact did not challenge or dispute the specific averment made on behalf of the respondents on the issue raised by the filing rebuttal affidavit evidence. Failure to do so amounted to concession on the part of the appellant (see para 23).

[Bahasa Malaysia summary

Dalam kesemua empat kes rayuan tersebut keempat-empat perayu telah merayu terhadap keputusan pesuruhjaya kehakiman yang bijaksana di Mahkamah Tinggi Johor Bahru dalam menolak permohonan masing-masing untuk satu deklarasi bahawa perintah sekatan yang dikeluarkan terhadap mereka oleh Timbalan Menteri Hal Ehwal Dalam Negeri ('timbalan menteri') di bawah s 2(2) Akta Kediaman Terhad 1933 (Semakan 1989) ('Akta tersebut') adalah terbatal dan tidak sah dan tidak berkuat kuasa. Adalah dipersetujui bahawa mahkamah akan mendengar hujah dan membuat keputusan berdasarkan rayuan oleh perayu dalam Rayuan Sivil No J–01–90–06. Peguam yang bijaksana bagi tiga perayu yang lain dan peguam kanan persekutuan bagi pihak responden-responden memaklumkan mahkamah bahawa mereka akan menggunakan penghujahan yang sama seperti dalam Kes Rayuan No J–01–90–06 untuk ketiga-tiga kes rayuan lain dalam J–01–91–06, J–01–101–06 and J–01–102–06.

Perayu, Keng Kien Hock telah ditangkap pada 6 Disember 2005 di Batu Pahat lebih kurang 1.30 petang di bawah satu waran tangkap dan penahanan yang dikeluarkan oleh timbalan menteri di bawah s 2(1) Akta tersebut dan telah dibawa ke Ibu Pejabat Polis Daerah Batu Pahat. Berikutan itu pada hari yang sama pada pukul 6 petang perayu telah dibawa ke Penjara Kluang, Johor dan ditahan di sana sehingga 30 Disember 2005. Pada 30 Disember 2005 timbalan menteri telah mengeluarkan satu perintah tahanan di bawah s 2(2) Akta tersebut menyekat perayu di Mukim Kulim, Daerah Kulim, Kedah selama tiga tahun mulai 30 Disember 2005 dan meletakkan perayu di bawah pengawasan polis untuk tempoh tersebut.

Berhubung isu pertama mengenai sama ada penahanan berlanjutan perayu di Penjara Kluang sebelum pengeluaran perintah sekatan bertarikh 30 Disember 2005 oleh timbalan menteri menyalahi undang-undang dan terbatal dan tidak sah kerana

timbalan menteri mengambil 24 hari daripada tarikh tangkapan untuk mengeluarkan perintah sekatan di bawah s 2(2) Akta tersebut, ia adalah hujah perayu yang pesuruhjaya kehakiman yang bijaksana terkhilaf dalam penemuannya bahawa kelewatan itu adalah bukanlah tidak munasabah dan dalam menerima penjelasan timbalan menteri.

Berhubung isu kedua mengenai sama ada penahanan perayu di Penjara Kluang, Johor daripada 6 Disember 2005 hingga 30 Disember 2005 bersama banduan lain membentuk satu penahanan di Penjara Sivil, intipati hujah perayu adalah bahawa beliau tidak pernah ditahan atau diperlakukan dalam 'Civil Prison' hanya kerana tiada peruntukan atau peraturan atau warta pemberitahuan spesifik tentang penjara sivil yang terbentuk di bawah Akta Penjara 1995.

Berhubung isu ketiga mengenai sama ada pegawai penjaga Penjara Kluang, Johor telah mematuhi s 3(2) Akta tersebut khususnya sama ada waran pembebasan seperti dalam Borang D kepada Jadual dalam Akta tersebut telahpun dikeluarkan, perayu menegaskan bahawa responden-responden telah gagal untuk membuktikan bahawa terdapat pematuhan dengan keperluan s 3(2) Akta tersebut.

Diputuskan, menolak rayuan tersebut dan sewajarnya menolak ketiga-tiga kes rayuan yang lain tanpa apa-apa perintah berhubung kos:

(1) Seksyen 54(2) Akta Tafsiran 1948 dan 1967 memperuntukkan bahawa di mana tiada masa ditetapkan untuk sesuatu itu patut dilaksanakan, perkara itu hendaklah dilaksanakan dengan seberapa segera dan sekerap mungkin seperti jika keadaan yang ditetapkan itu timbul. Terma 'a convenient speed' tidak ditafsirkan oleh mana-mana statut. Namun, definisi dan maksud 'a convenient speed' dalam konteks skop s 2 Akta tersebut boleh didapati daripada pengumuman kehakiman yang dibuat dalam kes-kes yang telah diputuskan terdahulu (lihat perenggan 6).

(2) Pendekatan yang boleh digunakan adalah pertama, ujian kesesuaian bukan pada kelewatan melaksanakan tanggungjawab sah tetapi sama ada tanggungjawab sah itu dilaksanakan dengan seberapa segera mengikut keadaan kes. Dalam ertikata lain sama ada menteri atau timbalan menteri telah bertindak dengan munasabah. Keduanya, beban membuktikan prestasi tanggungjawab sah dalam keadaan sedemikian kekal atas pemohon, orang yang disekat dan tidak pernah berpindah kepada responden, menteri (lihat perenggan 8–9); *Phua Hing Lai & Ors v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors and other appeals* [1990] 1 MLJ 173 dan *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia v Liau Nyun Fui & Ors* [1991] 1 MLJ 350 diikut.

(3) Kedudukan England yang dirujuk tidak patut digunakan kerana Akta Penjara 1995 dan Peraturan Penjara 2000 mengandungi peruntukan dan peraturan yang memadai berkaitan isu yang ditimbulkan tentang 'civil prison'. Ketiadaan peruntukan dan peraturan jelas yang mengawal terma 'civil prison' atau ketiadaan tempat tahanan yang sepatutnya telah diisytiharkan oleh menteri sebagai 'civil 'prison' tidak semestinya menandakan bahawa terdapat lacuna dalam perundangan berkaitan penjara atau ketidakwujudan penjara sivil.

Justeru itu tiada tanggungjawab ke atas menteri untuk mengisytiharkan mana-mana tempat tahanan sebagai 'civil prison' (lihat perenggan 14).

(4) Perayu dalam kes semasa, seorang yang ditahan di bawah s 2 Akta tersebut boleh dianggap sebagai 'unconvicted prisoner' yang jatuh di bawah kategori mereka yang terlingkung di bawah proses sivil. Perlu ditekankan peruntukan berkaitan 'unconvicted prisoners' terkandung dalam Bahagian 17 kepada Peraturan Penjara 2000 termasuklah antara lain satu peruntukan dalam peraturan 165 berkaitan pengasingan banduan yang belum disabitkan daripada mereka yang telah disabitkan. Selagi responden-responden telah membuktikan bahawa perayu ditahan menurut Bahagian 17 kepada Peraturan Penjara 2000, maka responden-responden hendaklah dianggap telah melepaskan tanggungjawab sah mereka seperti yang ditetapkan di bawah waran tangkapan dan tahanan sebagaimana dalam Borang A kepada Jadual dalam Akta tersebut (lihat perenggan 17).

(5) Penegasan semata-mata tanpa mengemukakan waran pembebasan berkaitan tidak mencukupi untuk melepaskan beban di pihak responden untuk menunjukkan pematuhan s 3(2) Akta tersebut. Mahkamah tidak bersetuju dengan hujah perayu. Dalam kes semasa responden melalui pegawai berkaitan telah membuat penegasan spesifik dalam afidavit mereka berhubung pengeluaran waran pembebasan Borang D dengan memberikan butir terperinci tentang proses pembebasan daripada penjara dan menyerahkan perayu kepada pihak polis. Mahkamah seterusnya mendapati perayu sememangnya tidak mencabar atau mempertikaikan penegasan spesifik yang dibuat bagi pihak responden-responden berhubung isu yang ditimbulkan dengan memfailkan afidavit pematahan keterangan. Kegagalan untuk berbuat sedemikan membentuk konsesi di pihak perayu (lihat perenggan 23).]

Notes

For vases on detention, see 10*Mallal's Digest* (4th Ed, 2005 Reissue) paras 22–23.

For vases on validity of detention order, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1455–1476.

Cases referred to

Phua Hing Lai & Ors. v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors and other appeals [1990] 1 MLJ 173 (folld)

Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia v Liau Nyun Fui & Ors [1991] 1 MLJ 350 (folld)

Legislation referred to

Interpretation Acts 1948 and 1967 s 54(2)
Prisons Act 1995 s 3
Prisons Regulations 2000 regs 2, 165, Part 17
Restricted Residence Act 1933 ss 2(1), (2), 3(2), Forms A, D of Schedule

Appeal from: Originating Summons NO 24–149 of 2006 (High Court, Johor Bahru)

K Shanmugam (Shanmugam & Co) for the appellant.
Najib bin Zakaria (Mohd Aszari bin Harun with him) (Senior Federal Counsel, Kementerian Keselamatan Dalam Negeri) for the respondents.

Zulkefli JCA (now FCJ, delivering judgment of the court):

INTRODUCTION

[1] There are four appeal cases fixed for hearing before us namely Civil Appeals No J-01–90–06, J-01–91–06, J-01–101–06 and J-01–102–06. In all these four appeal cases the four appellants are appealing against the decision of the learned Judicial Commissioner of the High Court at Johor Bahru in dismissing their respective application for a declaration that the restriction order issued against them by the Deputy Minister of Internal Security ('Deputy Minister') under s 2(2) of the Restricted Residence Act 1933 (Revised 1989) ('the Act') is null and void and of no effect. Mr Shanmugam, learned Counsel who appeared for all the four appellants and the learned senior federal counsel agreed at the outset that since the issues raised and the factual circumstances in all the four appeal cases are the same, it is only necessary for the court to hear and decide in only one of the appeal cases and the decision of that appeal case shall be made binding on the other three appeal cases. It was agreed that the court would hear argument and decide on the appeal by the appellant in Civil Appeal No J-01–90–06. Learned counsel for the other three appellants and the learned senior federal counsel for the respondents informed the Court that they would be adopting the same submission as in Appeal Case No J-01–90–06 for all the three other appeal cases in J-01–91–06, J-01–101–06 and J-01–102–06.

BACKGROUND FACTS

[2] The relevant background facts of Civil Appeal Case No J-01–90–06 are as follows:

[3] The appellant, Keng Kien Hock was arrested on 6 December 2005 in Batu Pahat at about 1.30pm under a warrant of arrest and detention issued by the Deputy Minister under s 2(1) of the Act and brought to Batu Pahat District Police Headquarters. Thereafter on the same day at 6pm the appellant was taken to Kluang Prison, Johor and detained therein until 30 December 2005. On 30 December 2005 the Deputy Minister issued a restriction order under s 2(2) of the Act restricting the appellant in Mukim Kulim, Daerah Kulim, Kedah for three years commencing 30 December 2005 and placing the appellant under police supervision for the said period.

ISSUES FOR DETERMINATION

[4] At the hearing of the appeal before us, learned counsel for the appellant indicated that the appellant will be raising only three issues for determination as follows:

(1) whether the appellant's prolonged detention at the Kluang Prison before the issuance of the restriction order dated 30 December 2005 by the deputy minister was unlawful and null and void as the deputy minister took 24 days from the date of arrest to issue the restriction order under s 2(2) of the Act;

(2) whether the appellant's detention at Kluang Prison, Johor from 6 December 2005 to 30 December 2005 together with other prisoners therein amounts to a detention in Civil Prison;

(3) whether the officer-in-charge of the Kluang Prison, Johor had complied with s 3(2) of the Act and in particular whether warrant of release as in Form D of the Schedule to the Act has been issued.

DECISION OF THE COURT ON APPEAL

[5] On the first issue it is the contention of the appellant that the learned judicial commissioner had erred in his finding that the delay was not unreasonable and in accepting the explanation of the deputy minister. The learned judicial commissioner held that the deputy minister had acted with convenient speed in the process of the issuance of the said restriction order. It is pertinent to note that s 2(2) of the Act does not prescribe any time frame within which the deputy minister is to issue a restriction order. For convenience the relevant provisions of s 2(1), 2(2) and 2A(1) of the Act are reproduced as follows:

2(1) Whenever it shall appear to the Minister on such written information and after such enquiry as he may deem necessary that there are reasonable grounds for believing that any person should be required to reside in any particular areas or should be prohibited from entering into any particular area or areas the Minister may issue an order in one of the Forms in the Schedule for the arrest and detention or, if he is already in prison, for the detention of that person.

2(2) The Minister thereafter after such further enquiry as he may deem necessary may make an order in the Form in the Schedule that from a date to be stated in the order, the person do reside in such area as may be specified in the order or do not enter into such area or areas as may be so specified.

2A(1) Without prejudice to section 2, the Minister may by order direct that any person named in the order shall be placed under police supervision for any period not exceeding five years and may renew any such order for a further period or periods not exceeding one year at any onetime.

[6] It is to be noted that s 54(2) of the Interpretation Acts 1948 and 1967 (Act 388) provides that where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises. The term 'all convenient speed' is not defined by any statute. However, the definition and meaning of 'all convenient speed' in the context of the scope of s 2 of the Act can be found from the judicial pronouncement made in earlier decided cases. In the Supreme Court's case of *Phua Hing Lai & Ors v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors and other appeals* [1990] 1 MLJ 173 his Lordship Hashim Yeop Sani, CJ Malaya at p 174 had this to say:

It can immediately be observed that there is no time frame given in s 3(i) of the Enactment. Since no time is prescribed then according to s 38 of the Interpretation and General Clauses Ordinance 1948 (similar provision also found ins. 54(2) of the Interpretation Act 1967), then anything which shall be done shall be done with all convenient speed. There is however a time frame given by s 3(ii) of the Enactment imposed by the words "as soon as may be after action has been taken under subsection (i)" appearing in that subsection. The words "as soon as may be" means as nearly as may be reasonable in the circumstances of the case. See also*Aminah v Superintendent of Prison, Pengkalan Chepa* [1968] 1 MLJ 92 Whoever caused the delay must explain the delay; and it is for the Court to decide whether the delay is reasonable under the circumstances.

[7] Subsequently the Supreme Court further expound the position established that 'whoever caused the delay must explain the delay' in the case of *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia v Liau Nyun Fui & Ors* [1991] 1 MLJ 350 wherein his Lordship Hamid Omar, the Lord President at p 353 stated the following:

In the light of the judgment in *Phua Hing Lai*'s case the position in law seems to be that when no timeframe is prescribed then anything that shall be done under s 2(ii) shall be done with all convenient speed. Accordingly in respect of situation (1), the further enquiry and the issue of the restriction order shall be effected with all convenient speed. What constitutes convenient speed would depend on the circumstances of each case. In respect of situation (2), where the Timbalan Menteri does not deem it necessary for any further enquiry he ought to proceed thereafter, that is, after the detention, to make the restriction order with all convenient speed. The correct test to be applied therefore is not on the basis of unreasonable delay but convenient speed. The learned judicial commissioner determined the question before him on the basis of unreasonable delay. This was not a proper approach. The question that was before him was whether the Timbalan Menteri in the particular circumstance of that case had acted with all convenient speed in making the restriction order. Strictly it was for the respondent to show that the Timbalan Menteri had not so acted and not for the Timbalan Menteri to provide an explanation acceptable to the court.

[8] It is clear based on the principles enunciated in the above mentioned two cases; the applicable approach to be adopted is firstly, the appropriate test is not on the delay in carrying out the legal obligation but rather on whether the legal obligation was carried out with all convenient speed

[9] Under the circumstances of the case. In other words, it is whether the minister or deputy minister has acted reasonably. And, secondly, the burden of establishing the performance of the legal obligation under such circumstances remained on the applicant, the restricted person and never shifted to the respondent, the minister.

[10] We are of the view that in order to arrive at a correct finding of fact as to whether the legal obligation was carried out with all convenient speed under the circumstances of such particular case, it shall be the duty of the trial judge to look into all the affidavit evidence adduced by the parties in the proceeding. On this point, in the present case we find the learned judicial commissioner had specifically made reference to the length of days taken by the deputy minister in order to perform the legal task under s 2 of the Act in the various originating summons filed by the respective appellants which were simultaneously heard together by him in which he stated as follows:

A Encik Shanmugam bagi pihak plaintif-plaintif telah berhujah bahawa terdapat kelewatan-kelewatan seperti berikut telah berlaku, iaitu:

SP 24–150–2006 — Selama 16 hari

SP 24–3664–2005 — Selama 20 hari

B SP 24–149–2006 — Selama 24 hari

SP 24–3166–2005 — Selama 21 hari

SP 24–3854–2005 — Selama 21 hari

C Menurut beliau kelewatan-kelewatan di atas adalah telah dilakukan oleh defendan pertama dan mengakibatkan plaintif-plaintif telah ditahan di penjara bersama banduan-banduan lain sebelum perintah pembuangan daerah atau perintah sekatan dikeluarkan oleh defendan pertama dan menjadikannya adalah terbatal dan tidak sah.

(See pp 23–24 of Appeal Record)

D **[11]** The learned judicial commissioner then referred to the approach taken in assessing whether the legal task performed by the Deputy Minister was reasonable under the circumstances of each particular case by adopting the principles as laid down in the said two cases of *Phua Hing Lai & Ors v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* and *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia v Liau Nyun Fui & Ors*. Subsequently the learned judicial commissioner
E undertook the exercise of assessing the affidavit evidence by stating the following:

Bagi tujuan ujian di atas, maka saya telah merujuk kepada kesemua afidavit-afidavit yang difailkan di dalam kelima-lima Saman Pemula ini, khususnya Afidavit oleh defendan pertama iaitu Timbalan Menteri Dalam Negeri, Malaysia. Dalam penelitian saya,
F YB Timbalan Menteri telah menjelaskan kelewatan tersebut melalui perenggan 5 dan 6 dalam qfidavit beliau yang berbunyi seperti berikut:

5. Pada 29.7.2005, saya telah mengeluarkan satu Perintah Sekatan 'TBW-2' seperti yang dilampirkan di dalam qfidavit pemohon terhadap pemohon iaitu:

(i) Saya harus melihat, meneliti dan menilai dokumen-dokumen dan fail kes pemohon
G yang relevan di dalam perkara ini;

(ii) Saya harus memutuskan samada untuk mengadakan inkuiri atau sebaliknya;

(iii) Saya harus menimbangkan rayuan jika ada yang akan dikemukakan oleh pemohon; dan

H (iv) Saya harus menentukan terma-terma dan syarat-syarat di dalam eksibit 'TWB2' dalam qfidavit ini.

6. Merujuk perenggan di atas, soya selanjutnya dengan tegas menqfikan pengataan-pengataan pemohon dalam perenggan- perenggan 6, 7 dan 11 afidavit pemohon dan menyatakan tindakan di bawah Akta tersebut yang diambil ke atas pemohon dibuat tanpa niat jahat dan soya dengan suci hati percaya penyataan-penyataan negatif yang
I dilemparkan oleh pemohon kepada responden-responden adalah bertujuan mengaburi tindakan pihak berkuasa dalam membenteras kegiatan perjudian haram yang mana pemohon merupakan seorang ejen dan penolong penyelia dalam sindiket empat ekor haram yang bergiat cergas di daerah Johor Bahru, Johor yang tidak mendatangkan faedah kepada keamanan dan ketenteraman awam. Saya juga menyatakan tindakan prosiding jenayah yang diambil ke atas pemohon gagal menyekat atau menghalang

kegiatan-kegiatan pemohon atas kelemahan-kelemahan pendakwaan semasa perbicaraan. Seterusnya soya dengan suci hati menyatakan responden-responden tidak membuat pakatan jahat untuk mengeluarkan pemohon dari Johor Bahru, Johor kecuali dengan tujuan menyekat pemohon dari meneruskan kegiatan penganjuran perjudian empat nombor ekor haram yang tidak mendatangkan faedah kepada keamanan dan ketenteraman awam.

(See pp 26–28 of Appeal Record)

[12] From the above observation made by the learned judicial commissioner, we are of the view that the learned judicial commissioner had conducted a proper assessment and evaluation of all affidavit evidence available meticulously before coming to his finding of fact that there has been a strict compliance with the application of s 2 of the Act read with s 54(2) of the Interpretation Acts 1948 and 1967. It is also to be noted that the appellant chose not to challenge or to rebut the Deputy Minister's explanation relating to the time taken in the performance of his legal task under s 2 of the Act as contained in his affidavit in reply in encl 8. Such an omission by the appellant to question the explanation given by the deputy minister rendered the said explanation as being plausible and unchallenged facts. We therefore dismissed the argument of learned counsel for the appellant in respect of the first issue.

[13] On the second issue, the crux of the appellant's contention is that he was never detained nor treated in 'Civil Prison' simply because there is no specific provision or rules or gazette notification on civil prison made under the Prisons Act 1995. The appellant claimed that he was detained at Kluang Prison in which he alleged that it was not declared by gazette notification as a Civil Prison and that he was not treated as civil prisoner. Learned counsel for the appellant reinforced his argument by referring to *Halsbury's Laws of England* (4th Ed) Vol 37 para 1250 which states as follows:

Civil Prisoners Rules must provide for the special treatment of Civil Prisoners (Prison Act 1952) section 47(4) (d,) CriminalJustice Act 1967 section 103(2) schedule 7 Part 1.

[14] With respect to the above contention of the appellant we are of the view that the position referred to England should not be made applicable because our Prisons Act 1995 and Prisons Regulations 2000 contained adequate provisions and rules relating to the issue raised on 'civil prison'. The absence of clear provisions and rules governing the term 'civil prison' or absence of place of detention duly declared by the minister as 'civil prison' does not necessarily imply that there is a lacuna in the legislation relating to prison or non existence of civil prison as contended by learned counsel for the appellant. In our view there is no obligation on the Minister to declare any place of detention as 'civil prison'. Section 3 of the Prisons Act 1995 merely empowered the minister to declare place of detention as a prison which provides as follows:

The Minister may, by notification in the Gazette, declare that any house, building, enclosure or place, or any part thereof, to be a prison for the purposes of this Act for the imprisonment or detention of persons lawfully in custody and may in like manner declare that any such prison shall cease to be a prison for the purposes of this Act.

[15] We may ask what does it mean by the terms 'civil prison' and 'civil prisoners'? These two terms are not defined both in the Prisons Act 1995 and the Prisons Regulations 2000. Perhaps it is pertinent to look into the common law sources for instance in *Halsbury's Laws of England* (4th Ed) Vol 37 para 1250 wherein with regard to the terms 'civil prisoners' it is inter alia stated as follows:

> 1250 Civil Prisoners. Since the virtual abolition in 1971 of imprisonment for civil debt, the only prisoners who committed to prison civilly and not by way of criminal justice (other than by way of civil contempt) are maintenance defaulters and those in default of payment of taxes and rates. Rules must provide for the special treatment of civil prisoner. They have the same rights and privileges as unconvicted prisoners so far as clothing correspondence and visits are concerned. If they elect to wear their own clothing they are not permitted to associate with convicted prisoners …..

[16] It is also to be noted that in the *Hasbury's Laws of England* (4th Ed) Vol 37 para 1244–1250 the term used for 'civil prisoner' and 'civil prison' fall within the general heading of 'Unconvicted Prisoners'. On this point reg 2 of the Prisons Regulations 2000 specifically defines 'unconvicted prisoner' as follows:

> *'nconvicted prisoner' means a person who is —*
>
> (a) *confined under civil process;*
>
> (b) on remand charged with a crime or an offence;
>
> (c) committed to take his trial;
>
> (d) confined for want of sureties; or
>
> (e) confined under section 4 of the Banishment Act 1959
>
> (Emphasis added.)

[17] We are of the view that the appellant in the present case, being a person detained under s 2 of the Act can be treated as 'unconvicted prisoner' falling under the category of a person confined under civil process. It is to be noted provisions relating to 'unconvicted prisoners' are contained in Part 17 of the Prisons Regulations 2000 which include amongst others a provision in reg 165 relating to separation of unconvicted prisoners from convicted persons. It is our judgment that as long as the respondents had proved that the appellant was detained in accordance with Part 17 of the Prisons Regulations 2000, then the respondents must be treated to have discharged their legal obligation as prescribed under the warrant of arrest and detention as in Form A of the Schedule to the Act.

[18] As regards the appellant's allegation that he was detained with other prisoners we would like to refer to the affidavit in reply of the deputy minister at para 7 as follows:

> Merujuk kepada perenggan 3 afidavit pemohon soya dengan tegas menafikan pengataan di dalamnya bahawa pemohon semasa berada di Penjara Kluang, Johor, beliau telah ditahan bersama dengan banduan-banduan lain. Sebaliknya beliau diletakkan berasingan di bahagian banduan sivil pada setiap masa beliau berada di penjara tersebut.

Sesalinan Waran Tangkap dilampirkan bersama ini menunjukkan arahan untuk beliau ditahan di penjara sivil dan ditanda sebagai "NO-1'

(See pp 100–101 of the Appeal Record)

[19] There is also an affidavit in reply of Superintendent of Prison in Kluang Prison, Samihan bin Hj Misdi at para 10 which states as follows:

10. Saya dengan hormatnya merujuk kepada perenggan 3 afidavit pemohon dan saya dengan tegasnya menajikan pengataan di dalamnya bahawa pemohon semasa berada di dalam Penjara Kluang, Johor, beliau telah ditahan bersekali dengan banduan-banduan lain. Sebenarnya beliau diletakkan bersekali dengan banduan sivil (buang tempatan) pada setiap mas a beliau berada di penjara tersebut.

(See p 106 of the Appeal Record)

[20] Based on the two affidavits in reply of the respondents we are of the view that the allegation made by appellant that he was detained in contravention of the requirements of the warrant of arrest and detention as in Form A of the Schedule to the Act had been adequately rebutted by the respondents. We therefore dismissed the argument of learned counsel for the appellant in respect of the second issue.

[21] On the third issue, the appellant contended that the respondents failed to prove that there has been a compliance with the requirement of s 3(2) of the Act. It was argued for the appellant there is no evidence shown by the superintendent of prison acting as the officer in charge and in performance of his legal obligation under s 3(2) of the Act that he had duly issued the warrant of release as in Form D of the Schedule to the Act.

[22] Contrary to the contention of the appellant, we however agree with the finding of the learned judicial commissioner that in fact there was due compliance by the respondents with the requirement of s 3(2) of the Act. This fact can be seen by reading paras 7 and 9 of Superintendent of Prison Samihan bin Hj. Misdi's affidavit in reply and para 11 of Chief Inspector of Police S Santhirasegaran bin Abdullah's affidavit in reply which state as follows:

Samihan bin Hj Misdi's Affidavit In Reply

7. Selepas itu saya telah menyerahkan Waran Pembebasan kepada C/INSP SHAM SANTHIRASEGARAN BIN ABDULLAH (1/9919) bersama-sama dengan pemohon dan satu salinan "KKH".

9. Saya sesungguhnya menyatakan juga pada masa yang sama saya telah menyerahkan Warrant of Release" iaitu warrant D di bawah seksyen 3(2) Aha Kediaman Terhad 1933 yang disempurnakan oleh saya kepada C/INSP SHAM SANTHIRASEGARAN BIN ABDULLAH untuk mengiringi pemohon ke Mukim Kulim, Daerah Kulim, Kedah seperti yang ditetapkan oleh YB Timbalan Menteri Keselamatan Dalam Negeri.

S. Santhirasegaran b Abdullah's Affidavit In Reply

11. Pada 30.12.2005, saya bersama L/Kpl 139166 Nurman Bin Sulaiman dan Konstabel 138656 Roslan bin Arifin ke Penjara Kluang, Johor untuk tujuan

menerima pemohon. Pada jam lebih kurang 10.30 malam, saya telah terima pemohon dari Samihan bin Hj. Misdi, pegawai yang menjaga Penjara Kluang, setelah selesai segala urusan pentadbiran dokumentasi, prosedur dan keselamatan selesai disempurnakan antara pemohon dan pihak Penjara Kluang.

[23] Learned counsel for the appellant also argued that the respondents failed in their affidavit in reply to annex or to exhibit the relevant warrant of release as in Form D of the Schedule to the Act issued by the officer in charge of prison to the escorting officer and this would tantamount to failure to comply with the requirement of the aforesaid provision. It is the contention of the appellant that mere averment without producing the relevant warrant of release is insufficient to discharge the burden on the part of the respondent to show compliance with s 3(2) of the Act. With respect, on this point we do not agree with the appellant's contention. In the present case the respondent through the relevant officers had made specific averment in their affidavits regarding the issuance of the Warrant of Release Form D by giving a detailed account of the process of release from the prison and the handing over of the appellant to the police. We further find the appellant in fact did not challenge or dispute the specific averment made on behalf of the respondents on the issue raised by filing rebuttal affidavit evidence. Failure to do so amounts to concession on the part of the appellant (see the case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281). We would therefore also dismiss the argument of learned counsel for the appellant in respect of the third issue.

CONCLUSION

[24] For the reasons already given we would dismiss the appellant's appeal. We would also accordingly dismiss the other three appeal cases as in Civil Appeal Nos J–01–91–06, J-01–101–06 and J–01–102–06. There will be no order as to costs in respect of all the four appeal cases.

Appeal dismissed.

Reported by Navit Kaur Randhawa